Supreme Court, U.S.
FILED
FEB 20 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-701

ROADWAY EXPRESS, INC.,
Petitioner

v.

J. D. MONK, ET AL.,
Respondents

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR THE PETITIONER

MILES CURTISS MCKEE
ARMIN J. MOELLER, JR.

FUSELIER, OTT, MCKEE & FLOWERS, P.A.
2100 Deposit Guaranty Plaza
Jackson, Mississippi 39201

(601) 948-2226

Counsel for Petitioner

TABLE OF CONTENTS

	Page
Table of Cases and Authorities	ii
Opinions Below	1
Jurisdiction	2
Statutes Involved	2
Question Presented	3
Statement of the Case	3
Summary of Argument	6
Argument	7
I. 28 U.S.C. § 1927, 42 U.S.C. § 2000e-5(k) AND 42 U.S.C. § 1988 SHOULD BE ENFORCED ACCORDING TO THEIR PLAIN MEANING	7
II. ASSUMING THAT SECTIONS 706(k) AND 1988 ARE INAPPLICABLE TO SECTION 1927, COURTS POSSESS INHERENT POWER TO INCLUDE ATTORNEYS' FEES AS COSTS UNDER SECTION 1927	19
Conclusion	21
Appendix A	1a

TABLE OF CASES AND AUTHORITIES

	Page(s)
Acevedo v. Immigration & Naturalization Serv., 538 F.2d 918 (2d Cir. 1976)	11
Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975)	13,15,19
Browning Debentures Holders' Comm. v. DASA Corp., 560 F.2d 1078 (2d Cir. 1977)	19
Caminetti v. United States, 242 U.S. 470 (1917)	8
Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978)	9,10 17,18
Field v. United States, 34 U.S. (9 Pet.) 182 (1834)	13
Flaska v. Little River Marine Constr. Co., 389 F.2d 885 (5th Cir.), *cert. denied*, 392 U.S. 928 (1968)	20
Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714 (1967)	5,16, 18,19
Flora v. Moore, 461 F. Supp. 1104 (N.D. Miss. 1978)	10
Gamble v. Pope & Talbot, Inc., 307 F.2d 729 (3d Cir.) (en banc), *cert. denied*, 371 U.S. 888 (1962)	20
Hall v. Cole, 412 U.S. 1 (1973)	19
Huddleston v. United States, 415 U.S. 814 (1974)	16
Huntington v. Attrill, 146 U.S. 657 (1892)	16
Hutto v. Finney, 437 U.S. 678 (1978)	6,15
In re Sutter, 543 F.2d 1030 (2d Cir. 1976)	20
Link v. Wabash R.R., 370 U.S. 626 (1962)	10,19
Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970)	19

	Page(s)
Motion Picture Patents Co. v. Steiner, 201 F. 63 (2d Cir. 1912)	6,14 15,19
National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639 (1976) (per curiam)	7,20
Newman v. Piggie Park Enterprises, 390 U.S. 400 (1968) (per curiam)	17
Prate v. Freedman, 583 F.2d 42 (2d Cir. 1978)	9,10,18
Sprague v. Ticonic Nat'l Bank, 307 U.S. 161 (1939)	7,19
St. Louis, Iron Mt. & S. Ry. v. United States, 251 U.S. 198 (1920)	18
Toledo Metal Wheel Co. v. Foyer Bros. & Co., 223 F. 350 (6th Cir. 1915)	16
United States v. American Trucking Ass'ns., 310 U.S. 534 (1940)	8,9
United States v. Missouri Pac. R.R., 278 U.S. 269 (1929)	8
United States v. Ross, 535 F.2d 346 (6th Cir. 1976)	15
Vaughan v. Atkinson, 369 U.S. 527 (1962)	19
Act of July 22, 1813, 3 Stat. 21	12,1a
Act of Feb. 26, 1853, 10 Stat. 162	14,1a
Revised Stats. § 982	14,2a
15 U.S.C. § 1117	18
28 U.S.C. § 1927	*passim*
42 U.S.C. § 1988 (as amended 1976)	*passim*
42 U.S.C. § 2000e-5(k)	*passim*
H.R. Rep. No. 50, 32d Cong., 1st Sess. (1852)	14
H.R. Rep. No. 308, 80th Cong., 1st Sess. (1947)	6,14
S. Rep. No. 94-1011, 94th Cong., 2d Sess. (1976)	15

	Page(s)
H.R. Doc. No. 25, 27th Cong., 3d Sess. (1842)	13
Antitrust Procedural Act of 1979: Hearings on S. 390 Before the Subcommittee on Antitrust and Monopoly, 96th Cong., 1st Sess. (1979)	16
47 Annals of Cong. 29, 43, 45, 54, 57, 60-61, 446, 456, 469 (1813)	13
Cong. Globe, 32d Cong., 2d Sess. App. 207-09 (1853)	13
122 Cong. Rec. 31832, 35117, 35124 (1976)	12
125 Cong. Rec. S1343-68 (daily ed. Feb. 8, 1979)	16
Sutherland Statutory Construction (C. Sands ed. 1973)	8,16,18
Brief of the NAACP Legal Defense Fund, Inc., as *Amicus Curiae*, Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978)	9
Note, *Attorney's Fees and the Federal Bad Faith Exception*, 29 Hastings L.J. 319 (1977)	10
Comment, *Financial Penalties Imposed Directly Against Attorneys in Litigation Without Resort to the Contempt Power*, 26 U.C.L.A. L. Rev. 855 (1979)	11
Comment, *Sanctions Imposed by Courts on Attorneys Who Abuse the Judicial Process*, 44 U. Chi. L. Rev. 619 (1977)	13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-701

ROADWAY EXPRESS, INC.,
Petitioner

v.

J. D. MONK, ET AL.,
Respondents

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, pp. 1a-8a) is reported at 599 F.2d 1378. The opinion of the district court on rehearing (Pet. App. C, pp. 11a-13a) is not reported. The opinion of the district court (Pet. App. D, pp. 14a-96a) is reported at 73 F.R.D. 411.

JURISDICTION

The judgment of the court of appeals was entered on August 3, 1979. The petition for a writ of certiorari was filed on October 31, 1979, and was granted on January 7, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

28 U.S.C. § 1927 provides:

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case as to increase costs unreasonably and vexatiously may be required by the court to satisfy personally such excess costs.

Section 706(k) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k), provides:

> In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

42 U.S.C. § 1988 (as amended 1976) provides in part:

> In any action or proceeding to enforce a provision of sections 1981, 1983, 1985, and 1986 of this title, . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

QUESTION PRESENTED

Whether attorneys who unreasonably and vexatiously multiplied proceedings in an action under Title VII of the Civil Rights Act of 1964 and 42 U.S.C. § 1981 may be personally assessed, pursuant to 28 U.S.C. § 1927, with attorneys' fees as part of the "excess costs" incurred by an opposing party as a result of such conduct?

STATEMENT OF THE CASE

I. Facts

On June 3, 1975, attorneys Robert E. Piper, Jr., Frank E. Brown, Jr., and Bobby Stromile filed a class action on behalf of three individuals against Roadway Express, Inc., the International Brotherhood of Teamsters, and Teamsters Local No. 194. The complaint alleged violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e to -17 (as amended 1972), and the Civil Rights Act of 1866, 42 U.S.C. § 1981 (R. 1).

Roadway subsequently moved to dismiss the complaint because of the plaintiffs' failure to make discovery and failure to comply with an order of the court (R. 343). On June 30, 1976, the district court dismissed the complaint,[1] without prejudice, pursuant to Rule 37 of the Federal Rules of Civil Procedure (R. 704). The district court retained jurisdiction, however, to determine whether further sanctions, namely Roadway's costs, would be imposed (*Id.*).

II. The Decision of the District Court

On January 6, 1977, after an evidentiary hearing, the district court awarded Roadway a portion of its costs,

[1] No appeal was taken from the district court's dismissal of the complaint.

including attorneys' fees, and assessed those costs personally against attorneys Piper, Brown, and Stromile (Pet. App. D, at pp. 15a-28a). In support of the assessment, the district court found that the three attorneys' misconduct[2] during the case had unreasonably and vexatiously multiplied the proceedings, and thereby had "escalated defendants' costs substantially" (Pet. App. D, at p. 19a).

The assessment was made pursuant to 28 U.S.C. § 1927, which the district court viewed as providing for "an equitable shifting of responsibility for unreasonable and vexatious costs from a party to his counsel" (Pet. App. D, at p. 24a). The term "costs" was read by the district court as including "only such costs as normally would be allowed to the prevailing party" (Pet. App. D, at p. 23a). This reading thus encompassed the language of Title VII's section 706(k), 42 U.S.C. § 2000e-5(k), and 42 U.S.C. § 1988 (as amended 1976), both of which provide that the court may "allow the prevailing party . . . a reasonable attorney's fee as part of the costs" in actions under the 1866 and 1964 civil rights acts.

[2] As later summarized by the court of appeals, the district court

> found that the forced dismissal of the plaintiffs' claims were caused by the total and deliberate failure of their counsel to properly prosecute them, as evidenced by their failure to answer Roadway's interrogatories as ordered; their failure to produce [plaintiff] McPherson for his deposition as previously agreed; their failure to advise their clients of their denomination as class representatives and the possible consequences of class representation; and their failure to file briefs twice requested by the court concerning this case's relation to a class certification entered in the Western District of Texas.

(Pet. App. A, at p. 4a)

On April 13, 1977, the district court denied a motion for rehearing[3] filed on behalf of the three attorneys by their malpractice insurer (Pet. App. C, at pp. 12a-13a). On May 5, 1977, the district court entered a judgment in favor of Roadway against attorneys Piper, Brown and Stromile (R. 790). On May 25, 1977, the judgment was amended to reflect the district court's dismissal, with prejudice, of Roadway's claim for costs, including attorneys' fees, against the individual plaintiffs. (Pet. App. B, at pp. 9a-10a).

III. The Decision of the Court of Appeals

A panel of the United States Court of Appeals for the Fifth Circuit concluded that the district court's findings of fact were not clearly erroneous, and agreed that under section 1927 the three attorneys "are subject to personal liability for the excess costs generated by their unreasonable and vexatious multiplication of the proceedings" (Pet. App. A, at pp. 4a-5a). The court of appeals disagreed, however, with the district court's inclusion of attorneys' fees in the assessment.

First, recognizing that "[t]he general American rule is that attorneys' fees are not ordinarily recoverable as costs" (Pet. App. A, at p. 5a), the court of appeals observed that "[s]ection 1927's reference to 'costs' neither specifically includes nor specifically excludes attorneys' fees as allowable costs under the statute" (*Id.*). Additionally, since the statute was considered penal in nature, the court held that section 1927 should be strictly construed (*Id.*). Relying on *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714 (1967), the court of appeals stated that it would not imply what was termed "an extraordinary

[3] Although the district court denied the motion, the court's January 6, 1977, opinion was amended to reflect that the plaintiffs' attorneys had filed a brief which the court incorrectly had stated was not filed (Pet. App. C, at pp. 12a-13a).

remedy" (Pet. App. A, at p. 7a) from section 1927 in the absence of statutory language or legislative history indicating that the costs provided for in the statute were intended to include attorneys' fees.

Second, the court of appeals held that the costs provisions of Title VII's section 706(k) and 42 U.S.C. § 1988 are inapplicable to attorneys. "Those sections provide for attorneys' fees awards against unsuccessful *parties* to a suit, and they focus on actions which are frivolous, unreasonable, and baseless in allowing awards against unsuccessful *plaintiffs*" (Pet. App. A, at p. 8a) (emphasis in original). Finally, the court of appeals concluded that "[n]either could the district court combine the provisions of those statutes with those of § 1927 to produce a hybrid result contemplated by none of the statutes" (*Id.*). The judgment of the district court was vacated insofar as it included attorneys' fees in the section 1927 assessment and the case was remanded for a determination of a "proper award" (*Id.*).

SUMMARY OF ARGUMENT

I.

Sections 1927, 706(k) and 1988 should be enforced according to their plain meaning. Section 1927 provides that "in any case" attorneys may be assessed with "costs." H.R. Rep. No. 308, 80th Cong., 1st Sess. A164 (1947) (1948 amendments to section 1927), *citing Motion Picture Patents Co. v. Steiner*, 201 F. 63, 64-65 (2d Cir. 1912) (section 1927 "costs" are limited to expenses "taxable as costs"). Sections 706(k) and 1988 provide that attorneys' fees may be allowed to the prevailing party "as part of the costs" in Title VII and 42 U.S.C. § 1981 actions. *Hutto v. Finney*, 437 U.S. 678, 696-97 (1978) (attorneys' fees awarded pursuant to section 1988 are "taxable costs"). Consequently, attorneys' fees may be included in an assessment of "costs" pursuant to section 1927 in Title VII and 42 U.S.C. § 1981 actions.

II.

Assuming that the attorneys' fees provisions in sections 706(k) and 1988 are inapplicable to section 1927, an assessment of "costs" under section 1927 may nevertheless include attorneys' fees. First, courts possess inherent equitable power to assess "costs of litigation other than the conventional taxable costs." *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 166 (1939). Second, courts possess inherent power to impose reasonable and appropriate sanctions on attorneys. In all cases the choice of sanctions is committed to the sound discretion of the district court, *National Hockey League v. Metropolitan Hockey Club, Inc.*, 472 U.S. 639 (1976) (per curiam), and, particularly in situations involving attorneys, the range of discretion accorded the district court must be wide. The district court's inclusion of attorneys' fees in the sanctions imposed on the attorneys in the instant case was a reasonable and appropriate exercise of its discretion.

ARGUMENT

I.

28 U.S.C. § 1927, 42 U.S.C. § 2000e-5(k) AND 42 U.S.C. § 1988 SHOULD BE ENFORCED ACCORDING TO THEIR PLAIN MEANING

The plain meaning of the statutes involved in this case compels the result reached by the district court. Section 1927 provides that "costs" may be assessed against attorneys "in any case." Sections 706(k) and 1988 provide

that attorneys' fees may be allowed to the prevailing party "as part of the costs" in actions under Title VII and 42 U.S.C. § 1981. Therefore, since attorneys' fees were "part of the costs" in this case, the district court's inclusion of counsel fees in the assessment of "costs" against the three attorneys was correct.

Statutes should be enforced according to their plain meaning. *E.g., United States v. American Trucking Ass'ns.*, 310 U.S. 534, 543 (1940); *United States v. Missouri Pac. R.R.*, 278 U.S. 269, 277 (1929); *Caminetti v. United States*, 242 U.S. 470, 485 (1917). *See generally* 2A Sutherland Statutory Construction § 46.01 (C. Sands ed. 1973). The court of appeals ignored this rule, and thereby reached a result which defies logic, substantially neutralizes the deterrent effects of section 1927, and does serious violence to the spirit and congressional intent underlying sections 706(k) and 1988.

The best argument for adhering to the plain meaning rule in this case is found in the exception to the rule. That is, statutes will not be enforced according to their plain meaning when to do so would produce "absurd or futile results" or "merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole.' " *United States v. American Trucking Ass'ns., supra*, 310 U.S. at 543. The exception is clearly absent from this case, and an analysis of the reasons for its absence provides valuable insight into the infirmities of the court of appeals' holding.

The net result of the district court's enforcement of the plain meaning of the statutes was to require the three attorneys to reimburse Roadway for the attorneys' fees incurred in defending itself against patently frivolous, unreasonable and vexatious proceedings. But for the district court's findings that the three attorneys were responsible for the abuses, Roadway's costs, including

counsel fees, could have been assessed against the individual plaintiffs. *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978).[4] Far from "absurd" or "unreasonable," the district court's decision reached the eminently sensible result of holding the perpetrators rather than the victims of the misconduct accountable for the economic consequences of the vexatious conduct. The court of appeals' holding, on the other hand, restricts attorneys' fees assessments to innocent litigants which, under the facts of this case, would indeed have been an absurd and unreasonable result.

Nor did the district court's decision produce a result " 'plainly at variance with the policy of the legislation as a whole.' " *United States v. American Trucking Ass'ns., supra*, 310 U.S. at 543. Congress intended for attorneys' fees to be allowed "as part of the costs" to employers forced to defend themselves against frivolous, unreasonable and vexatious actions filed under Title VII and 42 U.S.C. § 1981. *Christiansburg Garment Co. v. EEOC, supra*, 434 U.S. at 420-21.[5] Yet, at the same time, Congress also intended for such fees to be allowed only in exceptional

---

[4] Indeed, the district court might have correctly assessed the fees against the individual plaintiffs in spite of its findings concerning the attorneys' responsibility for the misconduct. Prate v. Freedman, 583 F.2d 42, 48 (2d Cir. 1978).

[5] Restitution and deterrence, however, are not the only principles supporting attorneys' fees awards to employers.

> Discouraging frivolous or vexatious litigation . . . is wholly consistent with congressional purpose, both because no valid purpose would be furthered by such litigation, and by discouraging it the courts would be free to focus their attention on substantial cases which present substantial issues arising under the civil rights laws.

Brief of the NAACP Legal Defense Fund, Inc., as *Amicus Curiae* at 15 (footnote omitted), Christiansburg Garment Co. v. EEOC, *supra*.

cases, in order to diminish the chilling effects of potential fee liability on the willingness of persons of limited means to vindicate their rights. *Id.* at 422.[6] Such an intent is totally at odds with holding plaintiffs of limited means responsible for substantial sums of money properly awarded to a defendant because of plaintiffs' counsel's misconduct.[7] It is submitted, however, that utilizing

[6] The specter of incurring attorneys' fees liability because of *counsel's* misconduct has perhaps even a greater "chilling" effect than simply knowing that such liability may be imposed because of one's own misconduct. *See* Note, *Attorneys' Fees and the Federal Bad Faith Exception*, 29 Hastings L.J. 319, 341-42 n.153 (1977) (noting such effects and arguing that the ABA Code of Professional Responsibility is "not a sufficient safeguard to deter bad faith litigation").

[7] *Compare* Flora v. Moore, 461 F. Supp. 1104, 1122 (N.D. Miss. 1978) (defendant's attorneys' fees in vexatious employment discrimination suit assessed against Legal Services Corporation representing plaintiffs where plaintiffs were "personally unaware of the irresponsible and vexatious manner in which their counsel were pursuing their action.... Although § 706(k) might be read to make plaintiffs legally liable, it would, we think, be unjust to impose personal liability upon the plaintiffs on a theory of vicarious responsibility under such circumstances.") *with* Prate v. Freedman, *supra*, 583 F.2d at 48 (plaintiffs' attorneys' responsibility for frivolous Title VII action, if anything, merely mitigates the amount of fees awarded against the plaintiffs), *citing* Link v. Wabash R.R., 370 U.S. 626, 633-34 (1962) ("each party is deemed bound by the acts of his lawyer-agent").

The *Prate* result is objectionable on at least two equitable grounds. First, the individual plaintiff is saddled with a financial obligation which he or she is only constructively charged with incurring. The real culprit, the attorney, would, unless the district court's holding in this case is reinstated, probably escape all economic consequences. Alternatively, the plaintiff might hire yet another lawyer and proceed with some attempt at obtaining indemnification from the attorney, such as

(footnote continues)

alternatives to direct assessments against individual plaintiffs, such as assessments against culpable attorneys, is totally consistent with congressional intent.[8]

(footnote continued)

a malpractice action. *See generally* Comment, *Financial Penalties Imposed Directly Against Attorneys In Litigation Without Resort to the Contempt Power*, 26 U.C.L.A. L. Rev. 855, 867-68 (1979). This course often would be economically prohibitive to Title VII plaintiffs and is certainly inefficient if responsibility for the fees can be otherwise assessed in the proceeding relating to the original action. *See* Acevedo v. Immigration & Naturalization Serv., 538 F.2d 918, 921 (2d Cir. 1976) (noting the client's inability to pay costs of misconduct and "modest education" in assessing costs against attorney under §1927). Second, reducing the fee award ignores the other victim of the misconduct, the employer. If employers are prohibited from recovering "excess costs," including attorneys' fees, under § 1927, and are awarded "mitigated" fees against individual plaintiffs who, as in this case, are not responsible for the vexatious suit in the first place, the fee award will be of little aid to the employer in recouping its losses.

[8] The Senate debates on § 1988 in particular reflect that Congress certainly did not intend for such legislation to protect unscrupulous lawyers or encourage attorney misconduct, as shown by the following exchange between two of the bill's floor managers in the Senate.

> Mr. Abourezk. There has been a great deal made here on the floor by opponents of this legislation that it would encourage frivolous lawsuits. It has been the "lawyers' relief bill," as every bill has been called when it has come up and there has been opposition to it. But, according to the provisions of the bill itself, is it not true that the legislation says the court, in its discretion, may award attorneys' fees to the prevailing party, so that if the defendant in a civil rights suit were to prevail the court could prevent a frivolous lawsuit by having that provision available?
>
> Mr. Hathaway. The Senator is absolutely correct. There is adequate safeguard in the bill to protect against frivolous lawsuits.

(footnote continues)

The result reached by the district court is also consistent with Congress' intent in section 1927. Passed in 1813 as part of "An Act concerning suits and costs in courts of the United States," Act of July 22, 1813, 3 Stat. 21,[9] section 1927 was apparently designed to remedy abuses by United States Attorneys, at that time compensated by statute on a per-service basis, who multiplied proceedings in order to increase their fees.[10] Thus, from the very beginning, attorneys' fees were within the purview of section 1927.

(footnote continued)

> Mr. Abourezk. So if somebody thought, some lawyer thought, he was going to make a lot of money by bringing civil rights suits he would be subject to being penalized himself; is that not correct?
>
> Mr. Hathaway. The Senator is correct.

122 Cong. Rec. 31832 (1976). *See also id.* at 35124 (remarks of Rep. Drinan) ("This bill is not intended, nor are the other 52 similar provisions in Federal law, to encourage groundless and frivolous litigation or to allow lawyers or litigants or their clients to recover unjustly from a defendant."). There is no indication that Congress intended to foreclose other available procedures under Federal law which might arise out of enforcement or assessment of an attorneys' fees award. *Cf. id.* at 35117 ("the defendant can take every legal remedy available to him to reach the essence of the plaintiff").

[9] The full text of the original provision is reproduced in Appendix A, *infra*. Also included in Appendix A are the texts of the provision from enactment to its current codification.

[10] Materials on the legislative history of § 1927 are limited. On June 18, 1813, the Senate appointed a committee

> to inquire what legislative provision is necessary to prevent multiplicity of suits or processes, where a single suit or process might suffice for the administration of justice in any cause to which the United States may be a party, or before any court of the United States, and that the committee have leave to report by bill or otherwise.

(footnote continues)

The statute existed in relative obscurity[11] until the general recodification of the Judicial Code in 1948, when

---

(footnote continued)

47 Annals of Cong. 29 (1813). A bill was reported by the committee on July 7, 1813, *id.* at 43, read a second time the next day, *id.* at 45, and ordered to a third reading as amended on July 15, 1813. *Id.* at 54. The bill was read a third time and passed in the Senate on July 16. *Id.* at 57. The bill was submitted to the House on July 16, *id.* at 446, read twice and referred for further consideration by designated members of the House on July 17. *Id.* at 456. The bill was reported with amendments and passed the House on July 20, *id.* at 469, and the amendments were concurred in by the Senate on the same day. *Id.* at 60-61. Counsel for Roadway has been unable to locate any documents (committee reports, debates, Senate and House documents, or any other legislative publications) strictly contemporaneous with the enactment.

A letter from the Secretary of the Treasury to the Speaker of the House in 1842, however, clearly suggests the purpose outlined in the text. H.R. Doc. No. 25, 27th Cong., 3d Sess. (1842). Other congressional materials also support this interpretation, as the abuses apparently continued well into the century. *See, e.g.*, Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 253, 250-54 & nn. 23-26 (1975) (citing and quoting congressional materials concerning the 1842 and 1853 fee bills). For a summary of the abuses, see Cong. Globe, 32d Cong., 2d Sess. App. 207-09 (1853) (remarks of Sen. Bradbury). The Secretary of the Treasury's comments on § 1927 provide an interesting view of the statute, a view not unlike that of a modern observer. *Compare* H.R. Doc. No. 25, 27th Cong., 3d Sess. 21 (1842) ("The statute... to restrain the increase of costs unreasonably and vexatiously, has been disregarded in practice; or it is defective in its provisions, if insufficient to prevent the abuses and mischiefs which have occurred, and which it ought to prevent, if it [does] not.") *with* Comment, *Sanctions Imposed by Courts On Attorneys Who Abuse the Judicial Process, 44 U. Chi. L. Rev.* 619, 623-29, 640 (1977) (noting the statute's disuse and arguing for its frequent application).

[11] Shortly after its enactment, this Court was presented with a case involving § 1927. Field v. United States, 34 U.S. (9 Pet.) 182 (1834). Chief Justice Marshall, however, found it

(footnote continues)

the most succinct statement of congressional intent, apart from the language of the statute itself, occurred. In 1948 Congress made minor changes in the phraseology of section 1927 and, more importantly, inserted the word "personally" under the authority of *Motion Picture Patents Co. v. Steiner*, 201 F. 63 (2d Cir. 1912). H.R. Rep. No. 308, 80th Cong., 1st Sess. A164 (1947). *Steiner* sets forth generally the operative language of the statute, 201 F. at 64, and describes with great precision both the "evident purpose" of the statute and the expenses includable in an assessment of "costs" under section 1927.

> The evident purpose of this section is to punish the lawyer who vexatiously increases costs, by making him, and not his client, liable for the increase occasioned by his improper conduct. It recognizes that such costs should not have been incurred and places their payment on the person who is responsible for them.

Id.

> If, on the other hand, the defendant's expenses are not *taxable as costs*, it is obvious that the

(footnote continued)

unnecessary to reach the issue: "With the question of costs this court has nothing to do; and as the judgment is reversed for another cause, it becomes immaterial to be considered." *Id.* at 202.

The language of § 1927 was included with minor changes in phraseology, see Appendix A, *infra*, in the 1853 fee bill. Act of Feb. 26, 1853, 10 Stat. 162. The House Report on the fee bill, H.R. Rep. No. 50, 32d Cong., 1st Sess. (1852), however, contains no direct reference to the provision. The provision thereafter became § 982 of the Revised Statutes, again with minor changes. See Appendix A, *infra*. The statute apparently was not changed in the 1911 amendments to the Judicial Code.

> complainant's conduct did not increase costs to the extent of these expenses.

Id. at 65 (emphasis added). The policies stated by the *Steiner* court, of course, parallel those articulated by the district court in the instant case. Similarly, the "costs" assessed in this case were specifically limited to "only such costs as normally would be allowed to the prevailing party" (Pet. App. D, at p. 23a); that is, taxable costs. Again, the exception to the plain meaning rule does not surface.

There remains, of course, the argument advanced in *United States v. Ross*, 535 F.2d 346, 350-51 (6th Cir. 1976), and expanded upon by the court of appeals below, "that the 'costs' provided by § 1927 should be limited to taxable costs [and] that attorneys' fees cannot be part of those costs" (Pet. App. A, at p. 6a). Since the general American rule excludes attorneys' fees from taxable costs, *e.g.*, *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247 (1975), the argument is generally valid. Attorneys' fees ordinarily may not be assessed against attorneys under section 1927 because, in the absence of one of the exceptions to the American rule, counsel fees are not "taxable costs" which can be assessed against the client. *Motion Picture Patents Co. v. Steiner*, *supra*, 201 F. at 64-65. This general rule, however, is inapplicable to the instant case. In this case, attorneys' fees are taxable costs[12] which can be assessed against the client under

[12] This Court has specifically held that attorneys' fees awarded pursuant to § 1988 are "taxable costs," Hutto v. Finney, 437 U.S. 678, 696-97 (1978), noting in the process that statutes such as § 706(k) and § 1988 are among those statutes which "define attorneys' fees as an element of costs, while others separate fees from other taxable costs." *Id.* at 697 n.28, *citing* Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, *supra*, 421 U.S. at 260-61 n.33. *See also* S. Rep. No. 94-1011, 94th Cong., 2d Sess. 5 (1976) (attorneys' fees awards against state and local officials pursuant to § 1988 should be treated "like other items of costs").

statutory exceptions to the American rule, namely sections 706(k) and 1988.[13]

Finally, the court of appeals' reliance on the "penal nature" of section 1927 and on this Court's opinion in *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714 (1967), is misplaced. First, the fact that section 1927 may be arguably penal in nature[14] does not warrant a construction of the statute which ignores its plain meaning. *E.g., Huddleston v. United States*, 415 U.S. 814, 831

[13] Congress is presently considering an amendment to § 1927 which would specifically include attorneys' fees as "costs" available under the statute in all cases. Senate Bill 390, which includes the amendment, was passed on July 20, 1979, and, since July 26, 1979, when the bill was referred to a House subcommittee, no further action on the legislation apparently has been taken. *See generally* 125 Cong. Rec. S1343 to S1368 (daily ed. Feb. 8, 1979); *Antitrust Procedural Act of 1979: Hearings on S. 390 Before the Subcommittee on Antitrust and Monopoly*, 96th Cong., 1st Sess. (1979). The current version of § 1927 has been described in this process as limited to "taxable costs." *E.g.*, Senate Antitrust Hearings, *supra*, at 27 (statement of Hon. Charles B. Renfrew).

[14] Viewed from the client's position, § 1927 is far from "penal," since it protects the client from the results of the attorneys' misconduct. Toledo Metal Wheel Co. v. Foyer Bros. & Co., 223 F. 350, 358 (6th Cir. 1915). *Cf.* Huntington v. Attrill, 146 U.S. 657, 676-77 (1892) (statute rendering corporate officers liable for debts arising from falsification of stock certificate penal as to officers but "clearly remedial" as to defrauded creditors). Accordingly, § 1927 should be construed liberally, particularly in cases where the result of a liberal construction would further enforcement of the civil rights acts by protecting plaintiffs while at the same time allowing the defendant to recover its attorneys' fees. *See also* 3 Sutherland Statutory Construction, *supra*, § 70.01 ("One of the historic functions of the law is to protect individuals from harms inflicted by fraud, deception and exploitation of unfair advantage.... Legislation of this character generally is construed in the way that maximizes its remedial effects as much as the legislative text reasonably permits.").

(1974). Furthermore, the authority for the basic award of attorneys' fees in this case is not section 1927. Section 1927 simply provides for a shifting of responsibility for the payment of costs authorized by other statutes applicable to the case or other authority available to the court. Consequently, whatever the result of a strict construction of section 1927 may be, that result can have absolutely no impact on the question of whether a particular item is a "taxable cost" and thus whether it may be assessed against an attorney under section 1927. That question is answered exclusively and independently by other statutes, such as sections 706(k) and 1988. The construction accorded these statutes, of course, can hardly be classified as "strict," even when applied to defendants, *see Christiansburg Garment Co. v. EEOC, supra*, 434 U.S. at 423 n.20 ("In short, there are equitable considerations on both sides of this question."), and the nature of attorneys' fees statutes such as sections 706(k) and 1988 is far from "penal." *See Newman v. Piggie Park Enterprises*, 390 U.S. 400, 402 (1968) (per curiam) (attorneys' fees provisions of civil rights acts not intended as penalties but as aids to advancement of public interest served by such legislation).[15]

[15] Attorneys' fees awards to defendants are as much a part of effective enforcement of the civil rights acts as awards to plaintiffs.

> [W]hile it was certainly the policy of Congress that Title VII plaintiffs should vindicate "a policy that Congress considered of the highest priority," *Piggie Park, supra*, 390 U.S., at 402, it is equally certain that Congress entrusted the ultimate effectuation of that policy to the adversary process, *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355. A fair adversary process presupposes both a vigorous prosecution and a vigorous defense. It cannot be lightly assumed that in enacting § 706(k), Congress intended to distort that process by giving the private plaintiff substantial

(footnote continues)

Second, the court of appeals' reliance on *Fleischmann Distilling Corp. v. Maier Brewing Co.*, *supra*, is misplaced. That case involved the question of whether attorneys' fees were properly awarded to a plaintiff as "costs of the action" pursuant to section 35 of the Lanham Act. 15 U.S.C. § 1117 (amended 1975). Recognizing the general American rule that "attorneys' fees are not ordinarily recoverable in the absence of a statute or enforceable contract providing, therefor," 386 U.S. at 717, this Court, finding no exception present, *id.* at 720, declined to award attorneys' fees "without either statutory language or legislative history to support the unusual construction." *Id.* In the instant case, of course, attorneys' fees are specifically provided for by sections 706(k) and 1988, thereby creating an express exception to the American rule adhered to in *Fleischmann Distilling Corp.* Again, section 1927 simply provides the court with a vehicle to fix the responsibility for costs properly allowed under other statutes and other authority available to the court.[16]

(footnote continued)

> incentives to sue, while foreclosing to the defendant the possibility of recovering his expenses in resisting even a groundless action unless he can show that it was brought in bad faith.

Christiansburg Garment Co. v. EEOC, *supra*, 434 U.S. at 419. *See also* Prate v. Freedman, *supra*, 583 F.2d at 48 ("The consequences of [plaintiffs'] attorneys' mistakes should not be visited upon the [defendant], whose participation in these suits helped to further the salutary purposes of Title VII.").

[16] The court of appeals' characterization of the district court's holding as a "hybrid result" (Pet. App. A, at p. 8a), ignores the fact that § 706(k), § 1988 and § 1927 all concern the same subject: "costs." The three statutes should, therefore, be construed *in pari materia*. *See generally* 2A Sutherland Statutory Construction, *supra*, §§ 51.01-.04. *See also* St. Louis, Iron Mt. & S. Ry. v. United States, 251 U.S. 198, 207 (1920) ("But, Congress must be presumed to have known of its former legislation . . ., and to have passed the new laws in view of the provisions of the legislation already enacted. These statutes must be construed together and effect given to all of them.").

II.

ASSUMING THAT SECTIONS 706(k) AND 1988 ARE INAPPLICABLE TO SECTION 1927, COURTS POSSESS INHERENT POWER TO INCLUDE ATTORNEYS' FEES AS COSTS UNDER SECTION 1927

Courts possess inherent power "to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Link v. Wabash R.R.*, 370 U.S. 626, 630 (1962). Since courts also possess inherent equitable power to assess "costs of litigation other than conventional taxable costs," *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 166 (1939), the district court's award of attorneys' fees to Roadway was supported by the "bad faith" exception to the American rule. *E.g.*, *Hall v. Cole*, 412 U.S. 1 (1973); *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970); *Vaughan v. Atkinson*, 369 U.S. 527 (1962). See *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, *supra*, 421 U.S. 240, 258-59 (1975).[17] Again, once awarded, the responsibility for payment was properly shifted from the individual plaintiffs to the three attorneys pursuant to section 1927. *Motion Picture Patents Co. v. Steiner*, 201 F. 63 (2d Cir. 1912); *see Browning Debentures Holders' Comm. v. DASA Corp.*, 560 F.2d 1078, 1088-89 (2d Cir. 1977) ("Bad faith is personal. . . .") (citation omitted).

The assessment against the three attorneys also falls well within the district court's inherent power to impose sanctions on the members of its bar.

> The power of a court to discipline members of its own bar can scarcely be doubted seriously. An attorney is under no obligation to seek admission to the bar of a United States district

[17] Thus, the court of appeals' reliance on Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714 (1967), is again misplaced.

> court. He is at liberty to abstain from membership in that or any other bar. But when he does apply and is admitted he secures certain privileges and also assumes definite obligations.
>
> The power of a court to impose appropriate and reasonable sanctions upon those admitted to its bar is a familiar phenomenon and lies within the inherent power of any court of record.

Gamble v. Pope & Talbot, Inc., 307 F.2d 729, 735 (3d Cir.) (en banc) (Biggs, C.J., dissenting), *cert. denied*, 371 U.S. 888 (1962); *accord*, *In re Sutter*, 543 F.2d 1030, 1036-38 (2d Cir. 1976); *Flaska v. Little River Marine Constr. Co.*, 389 F.2d 885, 888 (5th Cir.), *cert. denied*, 392 U.S. 928 (1968).[18] The plain language of section 1927 recognizes this authority. An assessment of sanctions is generally committed to the sound discretion of the district court, *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 642-43 (1976) (per curiam), and it is submitted that when sanctions are imposed on attorneys, officers of the court, the district court's discretion must be accorded even greater deference.

[18] In light of the Fifth Circuit's statement in *Flaska* that "[t]he inherent power of a court to manage its affairs necessarily includes the authority to impose reasonable and appropriate sanctions on errant lawyers practicing before it," 389 F.2d at 888, the court's opinion in the instant case is puzzling. Although Roadway argued cases such as *Flaska* as an alternative ground for affirmance of the district court's assessment, the court of appeals did not discuss the issue in its opinion in this case.

CONCLUSION

The judgment of the court of appeals, insofar as it vacated that portion of the district court's judgment which included attorneys' fees in the section 1927 assessment, should be reversed.

Respectfully submitted,

MILES CURTISS MCKEE
ARMIN J. MOELLER, JR.
JEFFREY A. WALKER

FUSELIER, OTT, MCKEE & FLOWERS, P.A.
2100 Deposit Guaranty Plaza
Jackson, Mississippi 39201

(601) 948-2226

Counsel for Petitioner

February, 1980

Appendices

APPENDIX A

An Act concerning suits and costs in courts of the United States.

. . . .

Sec. 3. *And be it further enacted*, That whenever causes of like nature, or relative to the same question shall be pending before a court of the United States or of the territories thereof, it shall be lawful for the court to make such orders and rules concerning proceedings therein as may be conformable to the principles and usages belonging to courts for avoiding unnecessary costs or delay in the administration of justice, and accordingly causes may be consolidated as to the court shall appear reasonable. And if any attorney, proctor, or other person admitted to manage and conduct causes in a court of the United States or of the territories thereof, shall appear to have multiplied the proceedings in any cause before the court so as to increase costs unreasonably and vexatiously, such person may be required by order of court to satisfy any excess of costs so incurred.

Act of July 22, 1813, 3 Stat. 21.

Whenever two or more indictments, suits or proceedings, are or shall be prosecuted, which should be joined, the district attorney prosecuting them shall be paid but one bill of costs for all of them; and if any attorney, proctor, or other person admitted to manage or conduct causes in any court of the United States, or of the Territories thereof, shall appear to have multiplied the proceedings in any cause before such court, so as to increase costs unreasonably and vexatiously, such person may be required, by order of the court, to satisfy any excess of costs so increased.

Act of Feb. 26, 1853, 10 Stat. 162.

If any attorney, proctor, or other person admitted to conduct causes in any court of the United States, or any Territory, appears to have multiplied the proceedings in any cause before such court, so as to increase costs unreasonably and vexatiously, he shall be required, by order of the court, to satisfy any excess of costs so increased.

Revised Stats. § 982.

Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case as to increase costs unreasonably and vexatiously may be required by the court to satisfy personally such excess costs.

28 U.S.C. § 1927.